BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIE SILAS	)	
Claimant	)	
	)	
VS.	)	
	)	
GORDON ENERGY & DRAINAGE	)	
Respondent	)	Docket No. 1,044,320
	)	
AND	)	
	)	
CINCINNATI INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 28, 2010, Award entered by Special Administrative Law Judge Seth G. Valerius. The Appeals Board (Board) heard oral argument on October 6, 2010. James E. Martin, of Overland Park, Kansas, appeared for claimant. D'Ambra M. Howard, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent). Due to the retirement of Board Member Carol Foreman, E. L. Lee Kinch was appointed as Board Member Pro Tem to serve in her place.

The Special Administrative Law Judge (SALJ) found that claimant's pre-injury average weekly wage (AWW) was $629.54 and that there was an overpayment of temporary total disability benefits in the total amount of $634.26. The SALJ found that claimant had an 11 percent permanent partial impairment to each of his upper extremities at the level of the forearm. Further, the SALJ found that claimant is not entitled to a work disability but is limited to compensation for two separate scheduled injuries.

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board, the parties stipulated that claimant's fringe benefits amounted to $37.50 per week. However, there is nothing in this record to identify the date when these fringe benefits ceased to be provided by respondent. (See K.S.A. 2008 Supp. 44-511(a)(2).)

ISSUES

Claimant contends the SALJ miscalculated his pre-injury AWW and also erroneously found that respondent was entitled to a credit for overpaid temporary total disability benefits. Claimant also asserts that the SALJ erred in considering the impairment rating of Bradley W. Storm, M.D., because the rating was based on opinions and findings made by a third party who was not a physician. Claimant asks the Board to find that he has a 20 percent permanent partial impairment to each of his upper extremities based on the rating opinion of Edward J. Prostic, M.D. Last, claimant argues that notwithstanding *Casco*,[1] he is entitled to a work disability under a strict construction of the Workers Compensation Act (Act), citing *Bergstrom*.[2]

Respondent also argues that claimant's pre-injury AWW was wrongly decided and contends claimant's AWW was $625.50 without including fringe benefits and $663.00 with fringe benefits of $37.50 per week included. Respondent further argues that the impairment rating of Dr. Storm was proper and his opinion should be given more credence than that of Dr. Prostic. Respondent also argues that claimant is not entitled to a work disability, nor is he permanently, totally disabled.

The issues for the Board's review are:

(1) What was claimant's pre-injury AWW; was there an overpayment or underpayment of claimant's temporary total disability benefits?

(2) What is the nature and extent of claimant's functional disability? At the time of the regular hearing, the parties stipulated that this was a functional only case.

(3) Is claimant entitled to work disability?

FINDINGS OF FACT

Claimant began working for respondent on July 19, 2005. During the period in which he is claiming injuries, from August 1, 2008, to October 16, 2008, claimant was working as a crew chief. In addition to his duties in instructing his crew's labors, he operated a Bobcat, used a sledge hammer to slam stakes into the ground, and used a staple gun to attach fabric to the ground. In August 2008, claimant noticed he had swelling and tingling in his hands. On October 10, 2008, claimant was fastening a Bobcat to a

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[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[2] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

trailer and in doing so put some force into bringing the boom down. The boom twisted, and claimant's right hand was bent backwards, causing him excruciating pain.

Respondent sent claimant to Charles Smith, M.D., for treatment, and claimant told Dr. Smith about his accident and also told him about the swelling and tingling in his hands. Dr. Smith sent claimant to Vito J. Carabetta, M.D., for an EMG on both arms. The EMG showed claimant had moderate bilateral carpal tunnel syndrome. Dr. Smith then referred claimant to Dr. Storm, a board certified plastic surgeon who has an additional certification in surgeries of the hand.

Dr. Storm first saw claimant on October 30, 2008. Claimant was complaining of numbness in his fingertips. After examining claimant, Dr. Storm diagnosed him with bilateral carpal tunnel syndrome and recommended bilateral carpal tunnel release. He performed carpal tunnel release surgery on claimant's right side on December 3, 2008, and on his left side on January 14, 2009. Because respondent had no light-duty work for claimant, Dr. Storm referred claimant to a work hardening program in February 2009. On March 17, 2009, claimant's final work hardening session, his therapist noted:

> Patient states that overall he's feeling a lot better. States he feels stronger and feels like he has more endurance, but states that he still has some pain when carrying. States that he feels he can return to work and perform some of the required duties, but doesn't feel like he could perform all of the duties.[3]

The therapist additionally noted: "With shoulder to overhead lift patient had tremoring of bilateral upper extremities, increased pain in bilateral wrists, and a 'pinching' sensation in his back."[4] Dr. Storm said these are common conditions a patient has during the recovery process.

Dr. Storm's final visit with claimant was on June 1, 2009. He performed a physical examination, and there were no significant findings. Dr. Storm did not believe that claimant was in need of additional medical treatment and did not place any permanent restrictions on claimant. In his opinion, claimant was physically capable of engaging in substantial, gainful employment. That same day, June 1, 2009, claimant was seen at Certified Hand Associates, Inc. There, at the request of Dr. Storm but not under his supervision, a therapist did testing on claimant. The therapist's findings were recorded on a worksheet, which was forwarded to Dr. Storm, which he then utilized to rate claimant's overall impairment of function.

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[3] Storm Depo., Ex. 5 at 1.

[4] Storm Depo., Ex. 5 at 2.

Dr. Storm testified that if he used the AMA *Guides*[5] strictly, claimant would have had a zero percent impairment. But since he believed it would be inappropriate to apply a zero percent rating, he chose to rate claimant as having a 2 percent permanent partial impairment per hand for potential symptoms related to permanent scarring.

When told that claimant testified his condition is not any better than it was before the surgeries, Dr. Storm said if that were true, claimant should be seen again. Dr. Storm also said it would be unlikely claimant still has moderate bilateral carpal tunnel syndrome after having carpal tunnel release operations. But he would not comment on claimant's current findings without a repeat EMG. He did not believe one could make a diagnosis of untreated carpal tunnel syndrome by patient complaints alone. Dr. Storm stated he had no indication at the time of his final examination that claimant was voicing complaints indicating his symptoms were unchanged. Dr. Storm said if claimant had made those complaints, he would not have released him from treatment or rated him.

Dr. Prostic, a board certified orthopedic surgeon, examined claimant on April 28, 2009, at the request of claimant's attorney, to evaluate him for work-related injuries sustained at respondent. Claimant told Dr. Prostic he developed pain, numbness, and tingling of his hands from activities at work. An EMG showed evidence of bilateral carpal tunnel syndrome. Claimant had carpal tunnel release surgeries and work hardening, and at the time of the examination had returned to his previous employment. Claimant told Dr. Prostic he continued to have symptoms in his hands, including intermittent numbness and tingling of the radial side of each hand; he awakened at night with pain, swelling and numbness; and he had weakness in his grip and soreness about his wrists.

After Dr. Prostic's examination, he diagnosed claimant with post-operative bilateral carpal tunnel syndrome release with continued evidence of carpal tunnel syndrome and cubital tunnel syndrome. And because of that, he was suspicious that claimant might have cervical myelopathy, a condition in which there is inadequate space for the spinal cord of the neck that can lead to numbness or weakness in one or both arms. Dr. Prostic recommended that claimant have an MRI of his cervical spine and a repeat EMG. He said that if claimant does have cervical myelopathy, further treatment to his upper extremities is unlikely to be beneficial until the cervical spine problem is cured. If, on the other hand, claimant has an adequate spinal canal, he needs to have more treatment to his ulnar nerves at the elbows and median nerves at the wrists.

Claimant saw Dr. Prostic a second time on October 12, 2009. He had not had the diagnostic tests Dr. Prostic had recommended. There is no indication in this record that claimant ever proceeded to preliminary hearing to request these tests. Dr. Prostic, therefore, could not make a determination as to whether claimant had cervical

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[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

myelopathy and whether further treatment would benefit his upper extremity problems. Dr. Prostic performed a second physical examination of claimant. Again, Dr. Prostic diagnosed claimant with entrapment of median and ulnar nerves of both arms, and he continued to be suspicious that claimant had cervical myelopathy.

Dr. Prostic rated claimant's impairment as being 20 percent to each upper extremity for a combination of ulnar nerve entrapment at the elbow, median nerve entrapment at the wrist, loss of sensation of all digits, and fairly severe weakness of grip.

On June 19, 2009, claimant was terminated by respondent. He testified that he has been looking for work since but has been unable to find a job. He has been receiving unemployment benefits in the amount of $265.00 per week.

Claimant testified that in the earnings statements,[6] his wages are broken down into regular pay, overtime, vacation, holiday, other, and prevailing wage. "Other" wages were those paid based on points received for keeping material and equipment clean and in good working order. Claimant described prevailing wage as the differential paid when working a job site in which his wage needed to be brought up to that of union workers on the same job site.

Claimant introduced as evidence of his wages a set of earnings statements and a set of what appears to be worksheets computing claimant's points. Neither set appears to be complete. Claimant did not testify as to what his hourly wage was, nor did he say how many hours per week he regularly worked. Due to the inconsistent amounts paid to claimant each week, the SALJ computed the pre-injury AWW by averaging the amounts of all wages paid to claimant in the 26-week period. He found that claimant earned $16,339.17 in that period, which he divided by 26 weeks to arrive at an AWW of $629.54.[7]

Claimant argues that his AWW should be computed using his last Earnings Statement of October 6, through October 12, 2008. That Statement shows claimant's regular wages for that week were $720.94, and claimant then calculated claimant's base hourly wage to be $19.8735.[8] Claimant then suggests the "Year-To-Date" totals be divided

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[6] R.H. Trans., Cl. Ex. 1.

[7] The Board has been unable to calculate claimant's AWW in the fashion described by the SALJ and cannot come up with the figure of $16,339.17. Further, dividing the figure of $16,339.17 by 26 calculates to an AWW of $628.43, not $629.54.

[8] The Board has not been able to determine how claimant came up with the $19.8735 figure, and it is not explained in his brief to the Board. A review of the worksheet in R.H. Trans., Cl. Ex. 2 showing claimant's work done between October 6, 2008, and October 12, 2008, shows total hours for claimant being 51.50. Dividing 51.50 hours into $720.94 comes to an hourly wage of $14.00.

by 23[9] and added to the regular wages of $720.94. Claimant also argues that fringe benefits in the amount of $37.50 be added to claimant's wages after his termination by respondent.[10] Claimant also suggests two alternative methods of calculating his AWW using the year-to-date of his regular pay and adding his overtime, bonus pay and fringe benefits.

Respondent calculates claimant's AWW by using an hourly wage of $14.00 and a 40-hour work week, for a base wage of $560.00. To that, respondent added weekly values for claimant's premium, bonus and overtime in the total of $64.85. Respondent also states that the amount it paid for fringe benefits was $37.50 per week. Respondent contends the fringe benefits were discontinued on June 30, 2009.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part:

> In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.A.R. 51-3-8(c) states:

> (c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

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[9] Claimant suggests the overtime, bonus, and other payments added to his regular wage be divided by 23, since there are only 23 weeks of Earnings Statements attached to the regular hearing transcript as Cl. Ex. 1. However, a review of the Earnings Statements in Cl. Ex. 1 and the worksheets in Cl. Ex. 2, attached to the regular hearing transcript as Cl. Ex. 2, indicate that claimant had earnings the entire 26 weeks but that some Earnings Statements are missing from Cl. Ex. 1.

[10] As noted by the SALJ in the Award, there is no testimony about the value of fringe benefits paid by respondent, nor is there a stipulation agreed to by the parties. However, both claimant's and respondent's attorneys stipulated to the Board at oral argument that weekly fringe benefits were paid by respondent on behalf of claimant in the amount of $37.50. The date that these fringe benefits ceased to be provided to claimant by respondent is not identified in this record. (See K.S.A. 2008 Supp. 44-511(a)(2).)

K.S.A. 2008 Supp. 44-511(b) states in part:

> (b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:
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> . . . .
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> (4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (I) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.
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> (5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the

employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(12) For the loss of a forearm, 200 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is

engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Casco*,[11] the Kansas Supreme Court held:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.
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> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> . . . .
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.

In *Bergstrom*,[12] in discussing an injured's good-faith effort to seek postinjury employment, the Kansas Supreme Court stated:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.
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> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group*, *Inc.*, 24 Kan. App. 2d 306, 320,

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[11] *Casco, supra*, at Syl. ¶¶ 6, 7, 9, 10.

[12] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, Syl. ¶¶ 1, 2, 3, 214 P.3d 676 (2009).

944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.

ANALYSIS

Claimant's exhibit 1 to the regular hearing contains wage statements beginning with the pay period of April 5, 2008, and continuing through pay period ending on October 12, 2008, a period of 27 weeks. However, this exhibit contains pay records for only 24 weeks prior to the date of accident on October 16, 2008. Pursuant to K.S.A. 2008 Supp. 44-511, the first week in claimant's exhibit 1 will be excluded as it is more than 26 weeks before the date of accident. Claimant alleges that claimant's exhibit 1 contains only 23 weeks of records. However, the excluded weeks, while not contained in claimant's exhibit 1, have been included in the totals contained in the final weekly pay sheet. When comparing the totals both before and after the missing weeks, the record supports a finding that the earnings during those missing weeks are included in the totals. Therefore, the record contains a total of 26 weeks of earnings for the purposes of calculating the AWW in this matter.

Under K.S.A. 2008 Supp. 44-511, claimant's wage is to be calculated based on an hourly rate if that can be determined. Here, claimant's hourly rate varied depending on the particular task being performed. It is not possible to calculate the hourly rate from this record, as claimant did not testify to a specific hourly rate and the wage records fail to properly identify same. Therefore, under K.S.A. 2008 Supp. 44-511(b)(5), the wage will be calculated by totaling the earnings during the 26 weeks preceding the accident and dividing by 26 weeks as determined from claimant's exhibit 1. Excluding the first week contained in claimant's exhibit 1, claimant earned a total of $15,212.18 in regular time and $854.03 in overtime. This totals $16,066.21, which, when divided by 26 weeks, calculates to $617.93.

K.S.A. 2008 Supp. 44-511(a)(2) allows the inclusion of fringe benefits to the AWW when those fringe benefits are discontinued. Here, there is no evidence as to the date the fringe benefits were discontinued. Therefore, it is impossible to determine the date those benefits should be added to the AWW. As it is claimant's burden to prove his entitlement to benefits in a workers compensation matter, the Board finds that claimant has failed to prove when these fringe benefits were discontinued and failed to prove when they should be added to the wage. The Board acknowledges that claimant was terminated from his employment on June 19, 2009, but there is no indication whether this date is proper for the inclusion of the fringe benefits. As noted above, respondent argues in its brief that claimant's fringe benefits ceased to be provided on June 30, 2009. As both parties agree that the fringe benefits would add $37.50 to claimant's average weekly wage, it is seen as inappropriate to deny claimant this benefit based on something so simple as an ending

date, especially considering respondent's argument. Therefore, in the interest of justice,[13] this matter will be remanded to the SALJ for the sole purpose of determining the ending date of claimant's fringe benefits and the proper date for their inclusion in the average weekly wage.

With regard to the nature and extent of claimant's injuries and disability, the Board finds that the determination by the SALJ that claimant suffered an 11 percent impairment to each upper extremity is supported by this record and is affirmed. Dr. Storm found claimant's impairment to be 2 percent to each upper extremity, finding that claimant had responded well to the surgeries. Dr. Prostic, on the other hand, found claimant to be experiencing significant difficulties post surgery. Both opinions are supported and disputed by this record. The ALJ found the truth to be somewhere in between, and the Board agrees. The award of an 11 percent impairment to each extremity is affirmed.

Claimant contends that the recent decision by the Kansas Supreme Court in *Bergstrom* requires that the limitations in *Casco* must be superseded by the AMA *Guides*, Sec. 2.2 Rules for Evaluations, which require that each organ system impairment should be expressed as a whole person impairment. While the Act does require the use of the fourth edition of the AMA *Guides*, this does not allow the AMA *Guides* to trump both the statute and Supreme Court precedent. The ruling in *Casco* that separate upper extremity injuries are to be compensated as separate scheduled injuries once the presumption of permanent total disability is rebutted remains good law. There is sufficient evidence in this record to verify that claimant remains capable of substantial and gainful employment and, therefore, is not permanently and totally disabled. Claimant's award is, thus, limited to a scheduled injury award for each upper extremity. The award of an 11 percent functional impairment to each upper extremity at the level of the forearm is affirmed.

CONCLUSION

The award will be modified to correct the computation of the AWW as noted above and remanded for a determination as to when the fringe benefit amount of $37.50 is to be added to the average weekly wage, but affirmed with regard to claimant's entitlement to an 11 percent functional impairment to each upper extremity at the level of the forearm for the injuries suffered through a series of accidents ending on October 16, 2008.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Special Administrative Law Judge Seth G. Valerius dated June 28, 2010, is modified with regard to the calculation of claimant's average weekly wage as above

[13] *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

noted and the overpayment of temporary total disability, but affirmed in all other regards. The matter is remanded to the Special Administrative Law Judge for the purpose of determining the appropriate date the fringe benefits are to be added to the average weekly wage. The matter will then be calculated based upon an 11 percent functional impairment to each upper extremity at the level of the forearm.

IT IS SO ORDERED.

Dated this _____ day of October, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Seth G. Valerius, Special Administrative Law Judge
Marcia Yates Roberts, Administrative Law Judge